

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45171  
Docket No. MW-43852  
24-3-NRAB-00003-230207**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**  
**(BNSF Railway Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces (Loram) to perform Maintenance of Way and Structures Department work (removed ties, installed concrete pads and curve oilers and associated duties) at various locations between Mile Post 433.1 to Mile Post 281.3 on the Milk River Subdivision beginning on October 4, 2014 and continuing through October 21, 2014 (System File B-M-2799-E/11-15-0161 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification of its intent to contract out the aforesaid work or to make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Hankinson, J. Conner, A. Mix, C. Kemmis, D. Cross, J. Peterson and J. Dunbar shall be compensated for ninety-six (96) hours at their straight time rates of pay and for fifty-five (55) hours at their time and one-half rates of pay.’”**

**FINDINGS:**

**The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:**

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimants have established and hold seniority within the Carrier's Maintenance of Way Department.

Beginning on October 4 and continuing through October 21, 2014, the Carrier assigned outside forces (Loram) to remove ties, install concrete pads and curve oilers and associated duties at various locations between Mile Posts 433.1 and 281.3 on the Milk River Subdivision.

In a letter dated November 13, 2014, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated January 13, 2015. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.

The Organization contends that the work of removing ties, installing concrete pads and curve oilers and associated duties is typical Maintenance of Way ("MOW") work. This work has customarily and historically been assigned to and performed by the Carrier's MOW forces and is contractually reserved to them under Rules 1, 2, 5, 6, 29, 55 and the Note to Rule 55 to the parties' Agreement.

The Organization contends that the Carrier did not factually dispute that the claimed work is basic MOW work that has customarily been performed by MOW forces. The Organization contends that the Carrier's assertion that the work has been subject to a "mixed practice" performed by both MOW forces and contractors is not supported in the record.

The Organization contends that it has presented a *prima facie* case of the Carrier's violation, so the burden shifts to the company to prove that the claim is not valid. The Carrier raised a "purchase" defense, but provided no evidence to support its assertion regarding the application of "FOB" Destination Freight collect.

The Organization contends that the Carrier failed to comply with the provisions of the Note to Rule 55 and Appendix Y. The Organization contends that

the work performed by the contractor forces neither required special equipment nor any special skills that were not already possessed by the experienced and fully qualified Claimants or any other MOW forces.

The Carrier contends that the Organization has failed to carry its burden of proving that a contractor performed the disputed work on the claimed dates and hours. The Carrier contends that the Organization's sought remedy is excessive and beyond the hours worked by any contractors in this regard.

The Carrier contends that the Agreement's general Scope Rule does not reserve the work to the BMWED, so the Organization must show that its members exclusively performed this work on a system-wide basis, which it failed to do.

The Carrier contends that if the MOW forces have performed similar work in the past, this would suggest no more than a "mixed practice" on the property, which defeats the Organization's claim to exclusive rights to perform the work.

The record shows this Board has previously recognized that lubricating tracks is scope-covered work. *See*, Third Division Award 44384. Here, the Organization presented employees' statements averring that the contractors performed the work and the Carrier offered no refutation of the statements.

Instead, the Carrier argued that there was a "mixed practice" on the property, whereby both MOW forces and contractors have performed this work. As evidence, the Carrier offered a November 5, 2012, e-mail from Inspector Scott Smith, which was also considered in Third Division Award 44384. Writing to a Vice General Chairman, he said,

In response to you [sic] question about the Industrial Lubricant technician working on the Hiline Sub: I have taken Tom Miller, the technician for Industrial Lubricant, out several times to work on both gage face greasers and top of rail greasers.

I have worked with him on installing carpet on several gage face greasers. I have also signed his work orders each time. He has been to Essex and has worked extensively on our tanks that fill the wayside greasers.

Industrial Lube has worked on the Hiline for quite some time, and Tom Miller is now the "local" representative that works on all of the lubricators on both the Hiline and the Kootenai.

He recently went to Texas to pick up a hyrail truck that will be used for filling wayside greasers.

In Award 44384, this Board found that the record was insufficient to find a mixed practice regarding lubrication work, or that a majority of the work was performed by contractors. The Board wrote,

Without more, a single contractor working on greasers with a Carrier supervisor is not sufficient to constitute a mixed practice, at least on the basis of the record under consideration here. The Organization has established a *prima facie* case, which the Carrier's evidence is not sufficient to rebut.

We find no reason to reach a different result in this case, where the same proofs were offered of an alleged mixed practice.

The record before us is insufficient to establish that the contractors worked a total of 96 hours at straight time rates and 55 hours at overtime rates. As such, we remand the issue to the parties for a joint check of the Carrier's records to determine the number of hours worked by the contractors to remove ties, install concrete pads and curve oilers and associated duties in dispute. The eligible Claimants shall be compensated at their respective straight time rate of pay for their portion of the total hours actually worked by the contractors.

### AWARD

Claim sustained in accordance with the Findings.

### ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 22<sup>nd</sup> day of February 2024.